SUPREME COURT, U. S.

70-272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

Docket No. 1-817

Supreme Court, U.S.
FILED
JUN 14 1971
E. ROBERT SEAVER, CLERK

JANE KATZ, an infant, by ELAINE FINSILVER, her mother and next friend, IRA RESNICK, an infant, by RHEBA RESNICK, his mother and next friend, CAREY MARVIN, an infant by VERA MARVIN, her mother and next friend, and GREG GOTTLIEB, an infant, by SYBIL GOTTLIEB, his mother and next friend, on behalf of themselves and all others similarly situated,

Petitioners,

—v.—

JOHN MCAULAY, as President of the Board of Education of the Union Free-School District No. 5, Ardsley, New York, and BURT P. JOHNSON, Superintendent of Schools of the Union Free School District No. 5, Ardsley, New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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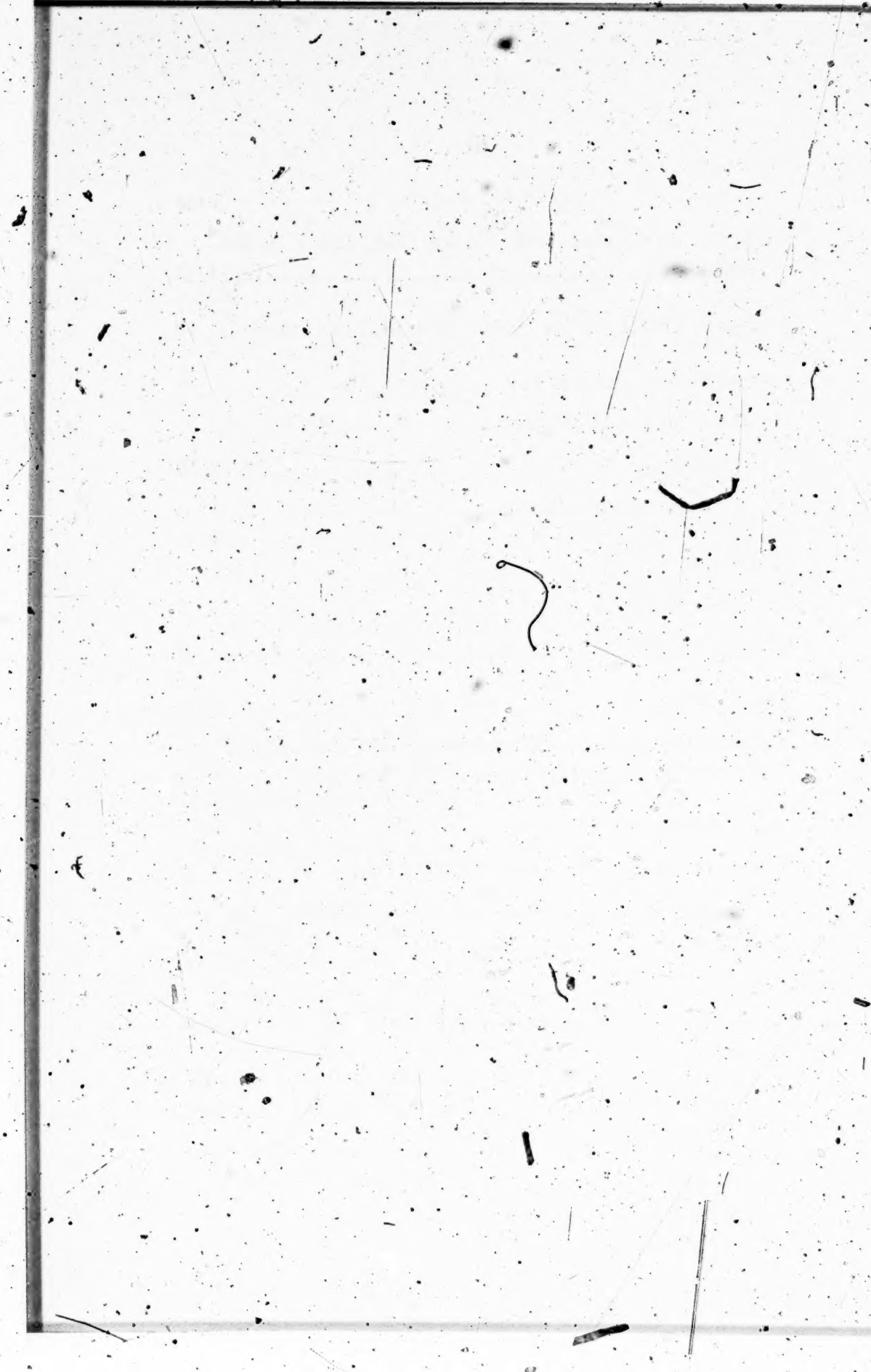

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Petitioners,

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JOHN MCAULAY, as President of the Board of Education of the Union Free School District No. 5, Ardsley, New York, and BURT P. JOHNSON, Superintendent of Schools of the Union Free School District No. 5, Ardsley, New York,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit.

Opinions Below

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto, at p. 21. The opinion of Judge Smith dissenting, appears in the Appendix hereto

at p. 28. The opinion of the District Court for the Southern District of New York, not reported, appears in the Appendix hereto at p. 17.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on February 11, 1971. A timely petition for rehearing *in banc* was denied on March 18, 1971, and this petition for certiorari is filed within 90 days of that date. This Court's jurisdiction is invoked under 28 USC §1254(1).

Questions Presented

Whether a public board of education may constitutionally forbid dissemination of literature on school property without the prior written approval of the Board.

Whether a public board of education may constitutionally apply a rule forbidding all solicitation of funds on school property to a leaflet presenting political views and seeking funds for legal assistance.

Whether regulations of a public board of education controlling solicitation of funds and dissemination of literature, on their face and as applied, may constitutionally discriminate in favor of certain organizations.

Regulations Involved

Regulation of Board of Education, Union Free School District No. 5, Ardsley, New York:

SECTION 5—NON-SCHOOL RELEASES

Sec. 5.1—Special Releases—No outside organization or business shall be permitted to use the schools of this School District for the dissemination or release of information by flyers, newsletters, bulletins, etc.; other than those heretofore approved and listed below; without the written approval of the Board of Education:

1. Girl Scouts	once a year
2. Boy Scouts	once a year
3. Little League	once a year
4. Babe Ruth League	once a year
5. UNICEF	once a year
6. Junior Red Cross	as required by school sponsor or advisor.

Rule drawn from New York State Regents Handbook:

From the *Handbook on Education Law* (1968), p. 92, §7:46.

7:46 May collections of money be taken up from school children in the school?

No. The Regents Rules prohibit taking up money collections of any kind from school children in the public schools. The only exception to the rule, is a collection for the Junior Red Cross, provided that in each

instance the consent of the school authorities of the locality be obtained. (Board of Regents, 1923 and 1940.)

Statement of the Case

This is a civil rights action, brought in the Southern District of New York pursuant to Title 42, United States Code, Section 1983, alleging violation of the petitioners' rights under the First and Fourteenth Amendments to the United States Constitution, in that the defendants threatened to punish the petitioners by suspension from Ardsley High School, a public high school, for distributing leaflets expressing their views on the trial of the "Chicago Conspiracy Seven" and appealing for contributions. The leaflet read (attached to Complaint, Record 1):*

JOIN THE CONSPIRACY!

During the Chicago convention, 8 activists were arrested for allegedly conspiring to incite to riot which violated the 1968 Civil Rights Act. They are presently being "tried" in Chicago.

Tied to his chair and taped from forehead to chin, one of the defendants was beaten in the chest and groin for protesting the fact that the circulation in his hands was slowly being cut off. This took place in a court of law.

Seale was deprived of his attorney in violation of the 3rd amendment of the constitution. Judge Hoffman has continuously shut off all attempts of the defense

* The numbered documents in the Record are referred to in the form Record ____.

to present its case. This is taking place in a court of law.

Much of the trial has violated the majority of laws in the Bill of Rights. We feel that their basic constitutional Civil Rights have been ignored. This is why we think that they "deserve" the money, not because we all agree with their political views.

More than $33,000 per month is spent on their defense. Money is desperately needed to give these people a just trial. Money is needed to pay for transcripts. *PLEASE* contribute and/or buy a button from Jane Katz or anyone else who is helping out.

On February 6 and 9, 1970, in the corridor of Ardsley High School, certain of the petitioners, who are students there, distributed copies of the leaflets to such students passing by as would take them. The distribution occurred before the school day began, and without disorder, disruption, interference with hall traffic or the threat thereof. (Affidavit of Jane Katz, ¶3, attached to Order to Show Cause, Record 2)

On February 9 and 10, 1970, the petitioners were informed by school officials, agents of defendants, that they could not obtain permission to leaflet in the school. This decision was based upon two policies. (Affidavit of Elaine Finsilver, attached to Record 2, Answer, ¶3, Record 3)

(1) A by-law of the Board of Education of Union Free School District No. 5 which forbids distribution of any "information by flyers, newspapers, bulletins," without the written approval of the Board, excepting certain non-controversial groups from the need for approval.

(2) A policy of the Board of Regents relating to "taking up money collections of any kind from school children." This prohibition is absolute, and makes exception only for the Junior Red Cross.

It further appeared that the petitioners had been attempting since September, 1969, a period of some six months, to settle the issue of rights of students to distribute leaflets. The issue had never been resolved, and students were not permitted to distribute leaflets. One of the plaintiffs had devised a plan offering to leave a copy of any leaflet with the Principal before distributing it. (Affidavit of Ira Resnick, attached to Record 2)

This action was begun by an Order to Show Cause dated February 20, 1970, seeking preliminary relief to protect the rights of the plaintiffs. That motion was denied in the District Court (Appendix p. 20) and that decision was affirmed by the Circuit Court of Appeals, Smith, J. dissenting (Appendix pp. 21-28).

REASONS FOR GRANTING THE WRIT

1.

The decision below conflicts with a decision of a three judge court in another circuit as to the scope of the constitutional rights involved.

The so-called "Regents Rule" in this case, which purports to forbid all solicitation of money in school, for any purpose except the Junior Red Cross, was upheld by the court below (Appendix p. 27) upon the ground that it has a "rational relationship to the orderly operation of

the school system." The interest in the orderly operation referred to is variously described as that of forestalling "the pressures upon students of multiple solicitations," the use of "more than polite requests to get contributions," and "competition for the time, attention and interest of the pupils with those who are seeking to administer the school system" (Appendix p. 26).

Precisely the same problem was confronted in *New Left Education Project* v. *Board of Regents of the University of Texas*, —— F. Supp. —— (W.D. Tex., 1970) prob. juris. post. —— U.S. —— (Oct. Term 1970, No. 1100), in which a statutory three-judge court invalidated a Regents Regulation of state-wide application which was similar in intent and effect to the Regents Rule in the present case. This presents a conflict between "courts whose decisions are final in the absence of Supreme Court review," Stern and Gressman, *Supreme Court Practice*, 162 (1969 ed.) and thus it establishes grounds for granting review in this case.

The terms of the conflict between this case and *New Left Education Project* are illuminating. That case held that soliciting funds for a political purpose is "speech and associational activity of a fairly high order." —— F. Supp. at ——.

> While it is often said that first amendment rights are not absolute, and that conduct incidental to the exercise of speech in public places is subject to reasonable nondiscriminatory regulation governing time, manner, and place, *Cantwell* v. *Connecticut*, 310 U.S. 296 (1939), it is well-settled law that once it is determined that state action impinges on high-order first amendment rights

—which these rules undoubtedly do—then the burden of proof is on the state to show that the governmental interests asserted to support the impingement are "compelling."

Moreover,

> "[l]egitimate legislative goals cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." *Elfbrandt* v. *Russell,* 384 U.S. 11, 18 (1966). This "less restrictive means" principle is especially applicable to regulations that impinge on first amendment speech and associational rights, even when accompanied by conduct.

Thus the three-judge court came to grips directly with the problems raised by the court below, holding, in accordance with well-established rules of constitutional interpretation, that it is not enough merely to find that the regulation has a "rational relationship to the orderly operation of the school system"; it must be so narrowly drawn as to reach *only* the compelling state interest involved. The court said:

> . . . while the Regents can certainly prohibit disruptive or fraudulent solicitation, they must do so in a manner that strikes at the very evil they wish to prevent. Applying this principle to the case at hand, we find that the Regents' solicitation rules at issue are unconstitutionally overbroad.
>
> The severe limitations the rules place on solicitation generally are unreasonably restrictive of the clearly protected activities engaged in by the plaintiffs in this case. Thus by broadly limiting all solicitation in the

> two rules, the Regents have simply failed to speak with that small calibre precision required of regulations touching first amendment rights.

The court even dealt with one of the specific problems raised by the court below here, that of multiple solicitations, saying

> . . . to the extent that campus congestion is a problem created by setting up solicitation booths, the Regents could formulate a reasonable, non-discriminatory rule limiting the number of such booths allowed on campus at any one time.

In the present case, there is no justification for the use of the regulation against petitioners' leaflet. Here the "fund-raisers" were students, not outsiders. There is no showing that students ever had misappropriated funds or ever would do so, or that the leaflet would in any way disrupt the conduct of the school. In particular, there is no evidence whatsoever that students solicited were, in the words of the District Court, "annoyed" (Appendix p. 20).

Petitioners are subject to school discipline for any abuses. The defendants might ask that written receipts be given to students who contribute in response to the leaflet, and that the petitioners keep a record of their collections for inspection by the defendants. Such a scheme is certainly possible for high school students without imposing the difficulties of "control" on the defendants. The petitioner Ira Resnick offered to submit leaflets to defendants before their distribution which would give defendants added assurances, but his attempts were refused. It is plain, in the end, that the "Regents' Rule" covers an enormous area of pro-

tected activity, and defendants have made no effort to limit its effects. As Circuit Judge Smith said, dissenting in this case (Appendix p. 28):

> " . . . complete prohibition as opposed to a reasonable regulation, as of time and place, cannot be sustained."

In summary, the court below applied a standard which is at variance with the "less restrictive means" principle enunciated by this court. The acceptance and application of a proper standard must necessarily lead, as it did in *New Left Education Project,* to a different result, because the Regents' Rule cannot in any way be described as narrowly drawn. It covers by its terms *all* solicitations of money for any purpose, political or otherwise (with one exception), and thus is not restricted to legitimate state interests.

2.

The decision below raises important questions concerning the First Amendment.

The questions involved are whether, under one regulation, the "Regents' Rule," students may be absolutely prohibited from distributing leaflets which solicit money for a clearly protected political purpose, or whether, under the other regulation, the "Board of Education Rule," they may be altogether prohibited from distributing any leaflets at all, absent the written approval of the Board of Education.

Regents' Rule

The narrower question, whether the solicitation of money may be absolutely prohibited, is one of importance in the First Amendment area. If persons who support a political

point of view may be forbidden, in a public place and under all conditions, from soliciting funds, then a powerful instrument for muzzling unpopular ideas—those which have the poorest financial support—is created. Judge Smith, dissenting in the court below, has summed up the petitioners' position (Appendix p. 28).

> . . . I think that when related to public issues such as that involved in this case, solicitation of funds is an integral part of the propagandizing, as in the case of the religious colporteurs, and freedom to do one includes freedom to do the other, at least in the absence of a showing of gross disruption, so that complete prohibition as opposed to reasonable regulation, as of time and place, cannot be sustained. See *Cantwell* v. *Connecticut,* 310 U.S. 296, 306-307 (1940). "[T]he pamphlets of Thomas Paine were not distributed free of charge." *Murdock* v. *Pennsylvania,* 319 U.S. 105, 111 (1943).

This court has recognized the intimate relation between the power to solicit financial support and the power to express ideas, *Murdock* v. *Pennsylvania,* 319 U.S. 105 (1943). In that case, a license tax imposed on sellers of religious tracts was held unconstitutional as applied. This Court said:

> Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way. 319 U.S. at 111.

To destroy the right to raise funds for a cause is really to limit or destroy that cause. See *Cantwell* v. *Connecticut,* 310 U.S. 296, 307 (1940). The question of the power of the

state to impose such a prohibition is an essential First Amendment problem.

This case, involving a prohibition upon solicitation, in essence differs from *Murdock* only in the fact that the locus in this case is a public high school. Indeed, the court below distinguished *New Left Education Project* v. *Bd. of Regents, supra,* solely (Appendix p. 27, fn. 5):

> on the premise that a state may decide that the appropriate discipline which requires the restriction of certain communicative actions may differ in the cases of university students from that called for in the cases of the younger secondary school pupils in relatively similar circumstances.

This case squarely presents the question whether First Amendment rights may be, not limited, but denied outright, solely because the petitioners are high school students. It is difficult to imagine a more pressing issue of First Amendment rights than this. *Tinker* v. *Des Moines Ind. School District,* 393 U.S. 503 (1969).

First Amendment rights in public high schools have been and are being widely litigated in the lower courts, see, e.g. *Scoville* v. *Bd. of Educ.,* 425 F.2d 10 (7th Cir., 1970); *Sullivan* v. *Houston Ind. School Dist.,* 307 F. Supp. 1328 (D.C. Tex., 1969). Each of the latter cases concerns, at least tangentially, raising funds through solicitation or the sale of literature, and disapproves prohibitions upon that activity. 425 F.2d at 13; 307 F. Supp. at 1348. Solicitation of funds is an integral part of First Amendment activity and it is as important in the high schools as on the streets or anywhere else in our society.

Board of Education Rule

The court below passed over the issue of the validity of the Board of Education Rule, which prohibits dissemination of literature without approval, upon the basis that the judgment of the District Court could be sustained by the Regents' Rule alone (Appendix p. 27). This holding is not supported by the record; the answer to the Complaint explicitly relies, in paragraph 3, on the Board of Education Rule. The deterrent or chilling effect of the Board of Education Rule is not removed, because even if there had been no Regents' Rule, the petitioners still would not have been able to distribute their leaflet under the Board's censorship rule.

The Board's Rule presents the broadest issues of freedom of speech and press in the public high schools. The question is whether the school authorities may impose a blanket rule of censorship, without standards or other controls. It is established law that such a prior restraint is unconstitutional on its face. Of the many cases in this Court, the closest is perhaps *Cantwell* v. *Connecticut,* 310 U.S. 296 (1940), in which a licensing statute for charitable solicitations was held unconstitutional as applied to Jehovah's Witnesses. This Court said:

> Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public.
>
> * * * * *
>
> But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination

by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution. *Id.* at 306.

Systems of prior restraint in schools have been rejected by lower courts, e.g. *Hammond* v. *S. Carolina State College*, 272 F. Supp. 947 (D.C.S.C., 1967) cited with approval in *Tinker* v. *Des Moines Ind. School Dist.*, 393 U.S. 503, 513 (1969); *Eisner* v. *Stamford Bd. of Educ.*, —— F.2d —— (2nd Cir., 1971).

As in the case of the Regents' Rule, the question is whether there is anything peculiar to the status of a high school student which may subject him to absolute censorship without standards. There is no case in which such untrammelled censorship is permitted; even in those cases where a state interest in prior restraint has been recognized, the licensing system has been rejected unless it is narrowly drawn to avoid arbitrary abuse. *Niemotko* v. *Maryland*, 340 U.S. 268 (1951) (use of parks); *Saia* v. *New York*, 334 U.S. 558 (1948) (use of sound trucks); *Freedman* v. *Maryland*, 380 U.S. 51 (1965) (exhibition of obscene films).

Discrimination

Both the Regents' Rule and the Board of Education Rule contain exceptions for particularly innocuous charities. Petitioners maintained, and it was not denied, that funds are raised for UNICEF and that the New York Times is sold in school. The court below found "no error in the denial of relief based upon allegedly discriminatory enforcement of the Board of Regents' Rule" (Appendix p. 23, fn. 2).

It is settled that, even if defendants had the power to prohibit all leaflets, or all fund-raising in Ardsley High School, they could not discriminate against some leaflets or fund-raisers. For example, in *Zucker* v. *Panitz*, 299 F. Supp. 102 (S.D.N.Y., 1969), the discriminatory refusal of the defendant to accept plaintiff's controversial advertisement in the school paper was held unconstitutional. The rule has been applied consistently to public schools, *East Meadow Comm. Concerts Assoc.* v. *Bd. of Educ.*, 18 N.Y. 2d 129 (1966) and colleges, *Dickey* v. *Ala. St. Bd. of Educ.*, 273 F. Supp. 613 (M.D. Ala., 1963) as well as to other public bodies, *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953).

Considering both rules, the Regents' Rule forbidding solicitation of money, and the Board of Education Rule imposing a prior restraint upon literature, we are presented with a scheme of regulation which affects the gamut of activities under the First Amendment, and effectively prevents all organizational and informational activity. The power of public high school authorities to take such actions is a basic legal problem affecting the lives of millions of young people. It is the position of petitioners that the rules delineated in *Tinker* v. *Des Moines Ind. School Dist.*, 393 U.S. 503 (1969) should be reaffirmed and applied. Thus no restraints are justified unless student activity "materially disrupts classwork or involves substantial disorder or invasion of the rights of others." *Id.* at 512. It is important that the broadest field for discussion be available in the high schools, because as this Court said in *Tinker, ibid.*, quoting *Keyishian* v. *Bd. of Regents*, 385 U.S. 589, 603 (1967):

> The classroom is peculiarly the 'market place of ideas.' The Nation's future depends upon leaders trained

through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, (rather) than through any kind of authoritative selection.'

CONCLUSION

For those reasons, a writ of certiorari should issue to review the judgment and opinion of the Second Circuit.

Respectfully submitted,

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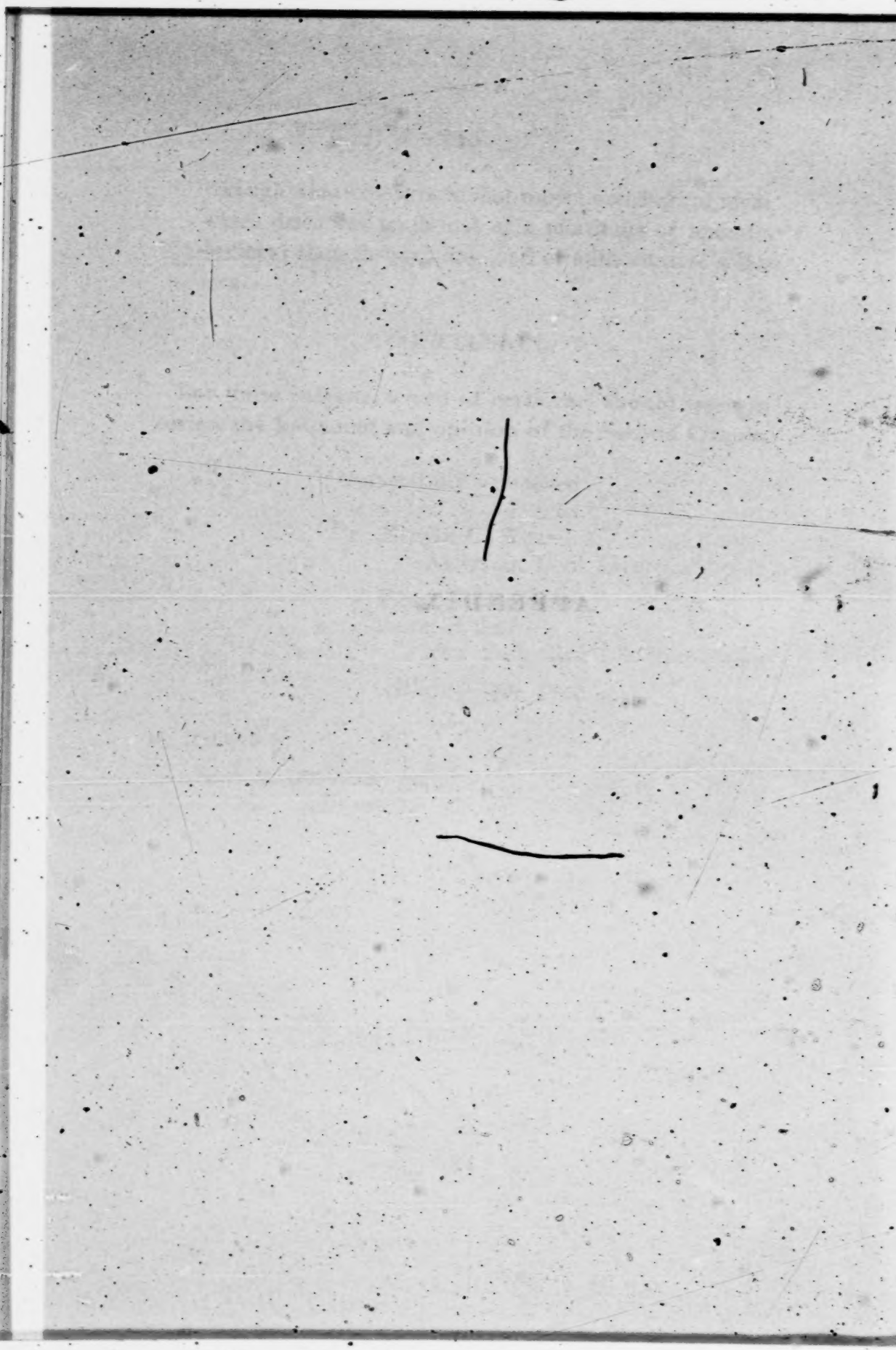
APPENDIX



APPENDIX

Opinion of the United States District Court, Southern District of New York

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 716

[SAME TITLE]

McLEAN, *D.J.*

Plaintiffs, students at the Ardsley High School, wish to engage in "leafleting" on the school premises, that is to say, they desire to hand out to their fellow students written documents expressing their views on public issues and soliciting money to support the causes in which they are interested. More specifically, in February 1970, plaintiffs attempted to distribute in the school building a one-page sheet entitled "Join the Conspiracy." In it they expressed their sympathy for certain "activists" then on trial on a criminal charge before Judge Hoffman in the United States District Court for the Northern District of Illinois. The leaflet stated:

> "More than $33,000 per month is spent on their defense. Money is desperately needed to give these people a just trial. Money is needed to pay for transcripts. *PLEASE* contribute and/or buy a button from Jane Katz, Carey Marvin, Greg Gottlieb or anyone else who is helping out."

The defendant school officials forbade plaintiffs to distribute this leaflet on school premises. In so doing they acted pursuant to a resolution of the Board of Regents of the State of New York which prohibits the soliciting of funds from school children in the public schools of this state, with the single exception that such solicitation is permitted on behalf of the American Junior Red Cross, provided that the school authorities consent.

Plaintiffs sue for a declaratory judgment declaring that "the policies, regulations and actions of the defendants . . . are unconstitutional." Plaintiffs also ask an injunction restraining defendants from preventing them from distributing this particular leaflet or any other leaflet which plaintiffs may wish to distribute soliciting funds for causes involving "matters of public interest." Jurisdiction is based on the Civil Rights Act, 42 U.S.C. §§1981 and 1983.

Plaintiffs have moved for a preliminary injunction. They claim that they have been discriminated against because Ardsley High School students are allowed (1) to solicit funds for the Junior Red Cross, (2) to sell newspapers, specifically the New York Times. The second claim is frivolous. As to the first, the Superintendent of Schools denies that there has been any solicitation in the High School, as distinct from the elementary schools, for the Junior Red Cross. He further states that he has now directed that there shall be no solicitations of funds at all even for so worthy a cause as the American Red Cross, the claim of discrimination does not seem to me sufficiently serious to justify a preliminary injunction on this ground.

Plaintiffs also claim that in preventing them from distributing this leaflet in the school building, defendants violated their First Amendment rights of free speech. This

is a much more substantial claim. It must be borne in mind, however, that we are concerned on this motion with one particular document, a leaflet which contains a plea for financial contributions. There is no claim that defendants have forbidden the distribution of any other document which confined itself to expressions of opinion without a request for money. We are not concerned, therefore, with free speech in the abstract or with broad generalizations about the rights of students to announce their opinions to anyone sufficiently interested to read or listen. The narrow question before me is whether there is a sufficient likelihood that plaintiffs will prevail at the trial in their contention that the decision of the school authorities with respect to this or similar documents violated plaintiffs' First Amendment rights to require the issuance of a preliminary injunction.*

Plaintiffs place their main reliance on *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969). The Supreme Court there held that the school officials had violated the students' First Amendment rights by forbidding them to wear black armbands in silent protest against the Vietnam war. After stating that the First Amendment means what it says, the Court said (393 U.S. at 513):

> "We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances."

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* Normally the matter of irreparable injury would also be considered on a motion for a preliminary injunction. There is authority, however, for the proposition that irreparable injury is presumed in a First Amendment case. *Schnell* v. *City of Chicago*, 407 F.2d 1084 (7th Cir. 1969).

Fund solicitation by students on school premises was not in any way involved in *Tinker*. I have found no other case concerned with it. The ultimate question to be decided on the merits in the present case is whether the action of defendants pursuant to the Regents' rule in prohibiting such solicitation is a "reasonable regulation of speech-connected activities."

The Regents' rule was promulgated in 1923. Presumably the sort of student unrest so prevalent today would have been beyond the comprehension of the Regents of fifty years ago. Although there is no evidence on the subject in the present record, it seems safe to assume that the rule was not intended to prevent the exercise of free speech by students or by anyone else. The purpose would appear to have been to protect school children from annoyance at the hands of solicitors eager, for one reason or cause or another, to induce them to part with their pocket money. To my mind, it seems an eminently reasonable regulation.

I am not called upon to decide the ultimate merits now. On the scanty facts contained in the affidavits in this motion, and in the present state of the law, I do not feel that I can say that there is a strong likelihood of plaintiffs' ultimate success at the trial.

Pursuant to Rule 52(a), this opinion constitutes the court's findings of fact and conclusions of law.

The motion for a preliminary injunction is denied.

So ordered.

EDWARD C. McLEAN
U.S.D.J.

Dated: May 8, 1970

Opinion and Judgment of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 251—September Term, 1970.

(Argued December 1, 1970 Decided February 11, 1971.)

Docket No. 35144

JANE KATZ, an infant, by ELAINE FINSILVER, her mother and next friend, IRA RESNICK, an infant, by RHEBA RESNICK, his mother and next friend, CAREY MARVIN, an infant by VERA MARVIN, her mother and next friend, and GREG GOTTLIEB, an infant, by SYBIL GOTTLIEB, his mother and next friend, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

—v.—

JOHN MCAULAY, as President of the Board of Education of the Union Free School District No. 5, Ardsley, New York, and BURT P. JOHNSON, Superintendent of Schools of the Union Free School District No. 5, Ardsley, New York,

Defendants-Appellees.

Before:

FRIENDLY, SMITH and ANDERSON,

Circuit Judges.

Interlocutory appeal from an order of the United States District Court for the Southern District of New York, McLean, *Judge*, denying plaintiffs' motion for a preliminary injunction against enforcement by school officials of a rule prohibiting solicitation of funds. Affirmed.

NEAL M. GOLDMAN, Esq., New York, N. Y. (Paul G. Chevigny, Esq., New York, N. Y., on the brief), *for Appellants*.

JOHN M. JOHNSTON, Esq., New York, N. Y. (White & Case and Raymond W. Vickers, Esq., New York, N. Y., on the brief), *for Appellees*.

ANDERSON, *Circuit Judge*:

The New York Board of Regents has a rule, some forty-seven years old, which prohibits "soliciting funds from the pupils in the public schools."[1] Plaintiffs, four students at Ardsley High School, a public school in Westchester County, New York, brought this civil rights action for anticipatory relief against enforcement of that rule. Their action arose when school officials threatened plaintiffs with expulsion if they distributed on school premises leaflets soliciting funds from their fellow students.

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[1] The Journal of Regents' Meetings records the adoption January 25, 1923 of a resolution prohibiting all solicitation of public school pupils. This resolution was modified in 1940 to permit solicitation of funds by the Junior Red Cross if that organization obtained the consent of local school authorities. The modified resolution is not included in the official Rules of the Regents but has been adopted by the Ardsley School Board as having binding effect.

More specifically, on February 6 and 9, 1970, plaintiffs distributed in the high school corridors a one-page leaflet entitled "Join the Conspiracy." In it they decried the prosecution of eight defendants then on trial in the District Court for the Northern District of Illinois and solicited funds for the "activists'" defense. The leaflet stated:

> "More than $33,000 per month is spent on their defense. Money is desperately needed to give these people a just trial. Money is needed to pay for transcripts. *PLEASE* contribute and/or buy a button from Jane Katz, Carey Marvin, Greg Gottlieb or anyone else who is helping out."

The dissemination of leaflets occurred before the school day began; and the affidavits of school officials contain no evidence of a specific instance of interference by the plaintiffs with the operation of the school or of any demonstrable collision with the rights of other students to be let alone. Nonetheless school officials warned plaintiffs that their circulation of leaflets violated the Board of Regents rule and a local Board of Education rule forbidding any "outside organization . . . to use this School . . . for the dissemination or release of information by flyers . . ." without first obtaining written approval of the Board.

Asserting the First Amendment overbreadth of both rules,[2] plaintiffs sought a declaratory judgment declaring

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[2] Plaintiffs also claimed school officials had discriminated against their solicitation by permitting (1) the Junior Red Cross to solicit contributions and (2) the New York Times to sell its newspapers on school premises. The district court found the second contention frivolous and denied preliminary relief on the first upon the affidavit of the Superintendent of Schools to the effect that all solicitations of funds had been, and would continue to be, prohibited. We find no error in the denial of relief based upon allegedly discriminatory enforcement of the Board of Regents' rule.

that "the policies, regulations and actions of the defendants . . . are unconstitutional" and preliminary and permanent injunctions restraining defendants from taking disciplinary action against students distributing this leaflet or any other leaflet soliciting funds for causes involving "matters of public interest." The court below denied plaintiffs' motion for a preliminary injunction and found that the Board of Regents' rule "was not intended to prevent the exercise of free speech" but rather set forth a reasonable regulation "to protect school children from annoyance at the hands of solicitors eager, for one cause or another, to induce them to part with their pocket money." —— F. Supp. at ——. Pursuant to 28 U.S.C. § 1292(a)(1), plaintiffs appeal from this interlocutory order.

An application for a preliminary injunction is addressed to the judicial discretion of the district court, and this court will not set aside the disposition of such an application unless erroneous as a matter of law or the result of an abuse of judicial discretion. *Hurwitz* v. *Directors Guild of America, Inc.*, 364 F.2d 67 (2 Cir.), *cert. denied*, 385 U.S. 971 (1966); see *Industrial Bank of Washington* v. *Tobriner*, 405 F.2d 1321 (D.C. Cir. 1968); 7 J. Moore's Federal Practice (2d ed.) ¶65.04[1]. We therefore go no further into the merits of this action than is necessary to determine whether the trial court's assessment of the relative importance, on the one hand, of the rights asserted and, on the other, of the governmental interest the rule purports to protect, constituted an abuse of discretion. In this connection consideration must be given to the irreparable nature of the injury allegedly flowing from the denial of preliminary relief[2] and the likelihood of the ap-

[2] The district court was willing to presume, as are we, that irreparable harm is manifest where it is alleged that First Amend-

plicants' ultimate success on the merits. See *Unicorn Management Corp.* v. *Koppers Co.*, 366 F.2d 199 (2 Cir. 1966); *Industrial Bank of Washington* v. *Tobriner, supra* at 1324.

The constitutional guarantee of free speech limits state power to regulate the personal intercommunication of secondary school pupils. *Tinker* v. *Des Moines Independent Community School District*, 393 U.S. 503 (1969). From this premise plaintiffs contend the distribution of leaflets which "communicate thoughts between citizens and discuss public questions," *Hague* v. *CIO*, 307 U.S. 496, 515 (1939), is protected expression and that such expression is no less protected by virtue of the fact that solicitation of contributions is an integral part thereof. See *Murdock* v. *Pennsylvania*, 319 U.S. 105 (1943).

Assuming that plaintiffs' activity was "speech" within the meaning of the First Amendment, school officials had the burden of showing governmental interests which might justify their interference with that "speech." *NAACP* v. *Alabama*, 357 U.S. 449 (1958). The Supreme Court has repeatedly affirmed that such an interest lies in the implementation of "the comprehensive authority of the States and school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Tinker* v. *Des Moines Independent Community School District, supra* at 507; see *Epperson* v. *Arkansas*, 393 U.S. 97, 104 (1968). The exercise of such authority may not, however, abridge the free expression of students in the public high schools unless that expression "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."

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ment rights have been chilled as the result of governmental action. See *Schnell* v. *Chicago*, 407 F.2d 1084, 1086 (7 Cir. 1969).

Tinker v. *Des Moines Independent Community School District, supra* at 509.

Though the skeletal evidentiary matter before the trial court disclosed minimal potential interference at most, the probability that plaintiffs' overbreadth contention would prevail at trial is so slight that the denial of preliminary relief cannot be held to have constituted an abuse of discretion. Unlike the amorphous "regulations" in *Sullivan* v. *Houston Independent School District*, 307 F. Supp. 1328 (S.D. Tex. 1969), the Board of Regents' rule articulated its proscription in terms of those non-expressive features of student conduct which raise a sufficiently high probability of harm—i.e. the pressures upon students of multiple solicitations[4]—to justify the Board's interference with such communicative conduct.

Pupils are on school premises in response to the statutory requirement that they attend school for the purpose of formal education. Where outside organizations or individuals espousing various causes seek to take advantage of the required assemblage of secondary school pupils, as a captive audience, to solicit funds, either directly or through the agency of some of the pupils, for their particular project or cause, they are in effect in competition for the time, attention and interest of the pupils with those who are seeking to administer the school system. Whether it is done a few minutes before school opens or a few minutes after, its effect is not so limited in time and it is plainly harmful to the operation of the public schools. If there is no regulation against it, literally dozens of organi-

[4] The affidavit of the Superintendent of Schools states that some 75 to 100 requests to use school properties for solicitation of funds have been denied in the past twelve years.

zations and causes may importune pupils to solicit on their behalf; and it is foreseeable that pressure groups within the student body are likely to use more than polite requests to get contributions even from those who are in disagreement with the particular cause or who are, in truth, too poor to afford a donation. The Board's regulation appears to be reasonable and proper and has a rational relationship to the orderly operation of the school system.

The rule's focus upon a demonstrable harm rather than an undifferentiated fear of disturbance distinguishes plaintiffs' action from *Scoville* v. *Board of Education*, 425 F.2d 10 (7 Cir. 1970). There, the complaint of students disciplined by school authorities, who were unable to prove a reasonable likelihood of substantial disruption which would follow the students' distribution of an underground newspaper, was held to state a claim for damages and declarative and injunctive relief. Though the underground newspaper was sold to students, the defendant school authorities did not act pursuant to an anti-solicitation regulation comparable to the Board of Regents' rule.[5]

Because the Board of Regents' rule afforded a sufficient basis for the denial of preliminary relief, we do not reach

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[5] This action is distinguishable as well from two lower court opinions filed after the denial of plaintiffs' motion. In the first of these, *Eisner* v. *Stamford Board of Education*, Civil No. 13220 (D. Conn. July 2, 1970), unlike the Board of Regents' regulation, a rule of prior restraint was found unconstitutional on its face.

The second decision, *New Left Education Project* v. *Board of Regents*, Civil No. A-69-CA-106 (W.D. Tex. Sept. 3, 1970), invalidated antisolicitation rules regulating the conduct of university students. For purposes of this appeal, however, we proceed on the premise that a state may decide that the appropriate discipline which requires the restriction of certain communicative actions may differ in the cases of university students from that called for in the cases of the younger secondary school pupils in relatively similar circumstances.

the same questions with respect to the local Board of Education rule upon which defendants may also have relied.

Affirmed.

SMITH, *Circuit Judge* (dissenting):

I respectfully dissent. I agree that there are possibilities of embarrassment and disruption of school functions in solicitation of school students which might justify regulation not sustainable as to the public at large. But I think that when related to public issues such as that involved in this case, solicitation of funds is an integral part of the propagandizing, as in the case of the religious colporteurs, and freedom to do one includes freedom to do the other, at least in the absence of a showing of gross disruption, so that complete prohibition as opposed to reasonable regulation, as of time and place, cannot be sustained. See *Cantwell* v. *Connecticut*, 310 U.S. 296, 306-307 (1940). "[T]he pamphlets of Thomas Paine were not distributed free of charge." *Murdock* v. *Pennsylvania*, 319 U.S. 105, 111 (1943). So I think on a showing such as this the courts must protect the students in their efforts to communicate, misguided as we may consider them. I would reverse for issuance of a temporary injunction.